

1 Record ("AR") at 60, 179. Mr. Maxwell underwent back surgery on
2 October 3, 1995. Id. at 92, 104. He first applied for Disability
3 Insurance Benefits on May 7, 1996. Id. at 151. From June to
4 September 1998, Mr. Maxwell worked as an accounts manager for a
5 cellular phone service. Id. at 152. In October 1998, Mr. Maxwell
6 returned to work as a mattress salesman. Id. At his first
7 disability hearing on May 12, 1999, the Administrative Law Judge
8 ("ALJ") found Mr. Maxwell to be disabled from October 1, 1995
9 through January 28, 1998. Id. at 161. The ALJ found that, as of
10 January 28, 1998, there had been medical improvement in Mr.
11 Maxwell's condition, and that beginning in June 1998, Mr. Maxwell
12 had the residual functional capacity for light work. Id. at 157.

13 Mr. Maxwell stopped working as a mattress salesman in July
14 1999 due to back pain. Id. at 183-85. On August 17, 1999, he
15 reapplied for disability insurance benefits and was denied on
16 November 21, 2000. Id. at 179-81, 276-82. Mr. Maxwell did not
17 appeal the decision. Id. at 19. After that, he worked as a
18 graveyard planning counselor and an admissions representative at a
19 vocational school. Id. at 353, 363. He stopped working in July
20 2001 because his back went out. Id. at 353. On August 4, 2003,
21 Mr. Maxwell had emergency surgery due to diverticulitis. Id. at
22 408, 561. The surgery performed was a sigmoid colectomy, which
23 involved excising part of Mr. Maxwell's colon and stapling. Id.
24 at 408-10.

25 On September 17, 2003, Claimant reapplied for disability
26 insurance benefits alleging disability beginning January 1, 2002.
27 Id. at 326. The application was denied initially and on

1 reconsideration. Id. at 290-93, 298-302. Claimant requested a
2 hearing, which was held before an ALJ on October 19, 2005. Id. at
3 303, 549-81. On May 16, 2006, the ALJ denied Mr. Maxwell's claim.
4 Id. at 15-24. This decision became final on November 1, 2007,
5 when the Appeals Council denied Mr. Maxwell's request for review
6 of the ALJ's decision. Id. at 10-12. On November 14, 2007, Mr.
7 Maxwell filed a complaint in this Court seeking review of the
8 ALJ's decision. Docket No. 1.

9 10 **III. LEGAL STANDARD**

11 To qualify for disability benefits, a claimant must show that
12 he or she is unable "to engage in any substantial gainful activity
13 by reason of any medically determinable physical or mental
14 impairment which can be expected to result in death or which has
15 lasted or can be expected to last for a continuous period of not
16 less than twelve months" 42 U.S.C. § 423(d)(1)(A). In
17 making this determination, "an ALJ conducts a five step inquiry.
18 20 C.F.R. §§ 404.1520 & 416.920." Lewis v. Apfel, 236 F.3d 503,
19 508 (9th Cir. 2001).

20 The ALJ first considers whether the claimant
21 is engaged in substantial gainful activity; if
22 not, the ALJ asks in the second step whether
23 the claimant has a severe impairment (i.e.,
24 one that significantly affects his or her
25 ability to function); if so, the ALJ asks in
26 the third step whether the claimant's
27 condition meets or equals one of those
28 outlined in the Listing of Impairments in
Appendix 1 of the Regulations [20 C.F.R. §§
404.1520(d) & 416.920(d)]; if not, then in the
fourth step the ALJ asks whether the claimant
can perform in his or her past relevant work;
if not, finally, the ALJ in the fifth step
asks whether the claimant can perform other

1 jobs that exist in substantial numbers in the
2 national economy. 20 C.F.R. §§ 404.1520(b)-
404.1520(f)(1).

3 Id.

4 Courts may set aside a decision of the ALJ if it is not
5 supported by substantial evidence. 42 U.S.C. § 405(g); Holohan v.
6 Massanari, 246 F.3d 1195, 1207 (9th Cir. 2001). "Substantial
7 evidence" is relevant evidence which a reasonable person might
8 accept as adequate to support the ALJ's conclusion. Reddick v.
9 Chater, 157 F.3d 715, 720 (9th Cir. 1998). In order to be
10 "substantial," the evidence must amount to "more than a
11 scintilla," but need not rise to the level of a preponderance.
12 Holohan, 246 F.3d at 1201. Where the evidence could reasonably
13 support either affirming or reversing the ALJ's decision, a court
14 may not substitute its judgment for the ALJ's decision. Id.

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16 **IV. DISCUSSION**

17 At Claimant's hearing, the ALJ conceded that this was "a very
18 close case." AR at 580. Ultimately, the ALJ concluded that
19 Claimant was not disabled within the meaning of the Social
20 Security Act. Id. at 24.

21 **A. The ALJ's Five Step Inquiry**

22 At step 1, the ALJ found that Mr. Maxwell's post-onset-date
23 work as a graveyard planning counselor and an admissions
24 representative did not constitute substantial gainful activity.
25 Id. at 20. At step 2, the ALJ found that Claimant had medically
26 determinable impairments diagnosed as degenerative disc disease of
27 the lumbar spine, diverticulitis and moderate obesity, and that

1 they significantly limited Claimant's ability to perform basic
2 work activities. Id. The ALJ found that Mr. Maxwell did not have
3 a severe mental impairment that has more than a minimal effect on
4 his ability to work because despite testimony about being
5 depressed due to pain, Claimant never sought treatment from a
6 mental health practitioner, and a March 2004 examination by a
7 consultative psychologist, Dr. Lewis-Wintrode, produced a
8 diagnosis of physical problems affecting psychological condition
9 only. Id. At step 3, the ALJ found that Claimant suffers from no
10 Listing level impairment.

11 Before going to step 4, the ALJ found that Mr. Maxwell has
12 the residual functional capacity to perform light work, as defined
13 at 20 C.F.R. § 404.1567(b), with the additional limitations of
14 "sitting and standing at will, no work at heights, rare crouching,
15 crawling and stooping, occasional stair climbing and reasonable
16 access to restrooms." Id. at 20-21. Based on this residual
17 functional capacity, the ALJ found, at step 4, that Mr. Maxwell is
18 able to perform his past work as a graveyard planning counselor or
19 admissions representative. Id. at 23.

20 **B. The Parties' Contentions**

21 As a threshold matter, the Court disposes of Defendant's
22 contention that the ALJ's November 21, 2000 decision created a
23 presumption that Claimant continued to be able to work after that
24 date. Cross-Motion at 3. The ALJ made a specific finding that
25 Claimant was in a different age category than when his case was
26 previously adjudicated. See AR at 23. That was a "changed
27 circumstance" that precluded the application of a presumption that
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1 Mr. Maxwell continued to be able to work. Id. The ALJ did not
2 rely on any presumptions when determining whether Mr. Maxwell was
3 disabled under the Social Security Act.

4 Claimant's contentions focus on the ALJ's determination that
5 Claimant had the residual functional capacity to perform his past
6 relevant work. Claimant contends that the ALJ did not properly
7 consider the opinion of Claimant's treating physician, the opinion
8 of the consultative psychologist, and the lay testimony of
9 Claimant and Ms. Holloway. Mot. at 6-19. The Court addresses
10 each of these contentions.

11 **C. Dr. Matsumura's Opinion**

12 Dr. Matsumura was Claimant's treating physician at the West
13 Oakland Health Center.¹ Claimant contends that the ALJ did not
14 provide clear and convincing reasons for rejecting Dr. Matsumura's
15 opinion. Mot. at 6-10. On February 10, 2005, Dr. Matsumura
16 performed a medical assessment of Claimant. AR at 503-05. Dr.
17 Matsumura found that Claimant was experiencing pain or muscle
18 spasm, significant limitation of motion in spine, and appropriate
19 radicular distribution of motor loss with muscle weakness. Id. at
20 504. Dr. Matsumura found that Claimant's concentration and memory
21 were moderately restricted due to pain or side effects of
22 medication, and Dr. Matsumura noted that Claimant "can't think
23 when hurting." Id. Dr. Matsumura found that Claimant was
24 experiencing spinal flares that would impair regular attendance at

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26 ¹ Both parties refer to the treating physician as "Dr.
27 Matsumura." See Mot. at 6; Cross-Motion at 4. In the record, the
28 treating physician's name is spelled "Dr. Matsumora." See AR at
503. The Court will use the spelling adopted by both parties.

1 work, and that the flares "completely prevent[] working." Id. at
2 505. According to Dr. Matsumura, Claimant is "completely,
3 permanently disabled." Id.

4 The ALJ rejected Dr. Matsumura's opinion because he found
5 that it was not well-supported by medically acceptable clinical
6 and laboratory diagnostic techniques. Id. at 21. While another
7 doctor, Dr. Pon, had noted some decreased range of motion in Mr.
8 Maxwell's back in December 2003, the ALJ determined that Dr.
9 Matsumura's "own treatment records fail to describe any
10 deterioration in the claimant's back after Dr. Pon's examination."
11 Id. The ALJ found no significant positive objective findings
12 related to Claimant's back in his treatment records from the West
13 Oakland Medical Center. Id. The ALJ noted that the treatment
14 records do not describe muscle spasm, significantly decreased
15 range of motion in Claimant's spine, or motor loss with muscle
16 weakness. Id.

17 The opinions of treating doctors should be given more weight
18 than the opinions of doctors who do not treat the claimant. 20
19 C.F.R. § 404.1527(d); see also Reddick, 157 F.3d at 725. Where
20 the treating doctor's opinion is not contradicted by another
21 doctor, it may be rejected only for clear and convincing reasons
22 supported by substantial evidence in the record. Reddick, 157
23 F.3d at 725. If the treating physician's opinion is contradicted
24 by the opinions of other doctors, the ALJ must provide specific
25 and legitimate reasons supported by substantial evidence in the
26 record for rejecting the treating physician's opinion. Rollins v.
27 Massanari, 261 F.3d 853, 856 (9th Cir. 2001).

1 Here, the ALJ provided clear and convincing reasons for
2 rejecting Dr. Matsumura's opinion. Dr. Pon's medical report,
3 based on an examination conducted in December 2003, noted that
4 Claimant "was sitting in the waiting room comfortably. He was
5 able to get off the chair and walk into the exam room." AR at
6 425. Dr. Pon noted that "Claimant ambulates with no ambulatory
7 aid . . . He was sitting comfortably during the history taking.
8 He was able to undress, bend over, take off his shoes normally and
9 without discomfort." Id. Dr. Pon acknowledged that Claimant was
10 suffering from residual low back pain due to his lumbar spine
11 surgery in 1995, and noted some decreased range of motion in
12 Claimant's back. Id. at 426. However, the ALJ correctly
13 concluded that Dr. Pon's physical examination of Mr. Maxwell was
14 otherwise unremarkable. Id. at 21.

15 The ALJ rejected Dr. Matsumura's findings of muscle spasm,
16 significantly decreased range of motion in Claimant's spine, and
17 motor loss with muscle weakness because these findings are
18 inconsistent with Dr. Pon's findings, and there is nothing in the
19 treatment records between these two examinations that supports Dr.
20 Matsumura's finding of a significant change in Mr. Maxwell's
21 physical condition. While the opinions of treating doctors should
22 normally be given more weight, Social Security Regulation 96-2p
23 provides that "[c]ontrolling weight may not be given to a treating
24 source's medical opinion unless the opinion is well-supported by
25 medically acceptable clinical and laboratory diagnostic
26 techniques." S.S.R. 96-2p available at 61 Fed. Reg. 34,490,
27 34,490-91 (July 2, 1996). Because there is nothing in the
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1 treatment records, the ALJ found that Dr. Matsumura's opinion was
2 not well-supported. AR at 21.

3 The Court, however, is troubled by the ALJ's statement that
4 he would give Dr. Matsumura's opinion no deference. See id. The
5 Social Security Regulations provide that even if not entitled to
6 controlling weight, treating physician medical opinions are still
7 entitled to deference. See S.S.R. 96-2p. However, despite the
8 ALJ's statement, the record indicates that the ALJ gave some
9 deference to Dr. Matsumura's opinion because the ALJ added
10 limitations to Dr. Pon's determination of functional capacity.
11 The ALJ added the limitations of "sitting and standing at will, no
12 work at heights, rare crouching, crawling and stooping, occasional
13 stair climbing and reasonable access to restrooms." AR at 20-21.
14 The Court may not substitute its judgment for the ALJ's decision
15 where the evidence could reasonably support either affirming or
16 reversing the ALJ's decision. See Holohan, 246 F.3d at 1202. And
17 perhaps most importantly, Claimant concedes the accuracy of the
18 ALJ's determination that the treatment records do not describe the
19 physical limitations noted by Dr. Matsumura. Mot. at 10.

20 Instead, Claimant's main contention is that the ALJ provided
21 no explanation for rejecting Dr. Matsumura's statement that
22 Claimant had a limitation of concentration and memory due to pain.
23 Id. at 6, 9. Dr. Pon examined Claimant's physical limitations
24 only and did not comment on any mental limitations due to pain.
25 See AR at 424-27. Instead, Claimant was sent to a consultative
26 psychologist, Dr. Lewis-Wintrode, to test whether there was a
27 mental limitation. See AR at 452-59. Claimant contends that Dr.

1 Matsumura's finding that Claimant's concentration and memory were
2 moderately restricted due to pain was supported by the findings of
3 the consultative psychologist, and therefore should not have been
4 rejected by the ALJ. Mot. at 8, 10.

5 Before turning to the findings of the consultative
6 psychologist, the Court notes that there are problems with
7 Claimant's reliance on Dr. Matsumura's statement that Claimant's
8 concentration and memory were moderately restricted due to pain.
9 First, Dr. Matsumura was talking about gastrointestinal pain, not
10 back pain. See AR at 504. Second, the ALJ did take into account
11 the fact that Mr. Maxwell had been treated for abdominal pain,
12 noting that Mr. Maxwell underwent a sigmoid colectomy in August
13 2003, and that the treatment records indicate no significant
14 findings of diverticulitis since the surgery. Id. at 21. Third,
15 the ALJ gave some deference to Dr. Matsumura's findings regarding
16 abdominal pain, noting that Dr. Matsumura did not impose any
17 limitations due to abdominal pain. Id. at 22. Fourth, even if
18 the ALJ accepted Dr. Matsumura's finding that Claimant's
19 concentration and memory were moderately restricted due to pain,
20 this finding by itself does not show that Claimant suffered from a
21 severe psychological limitation rendering Claimant unable to
22 perform all work for a continuous period of twelve months.
23 Perhaps in recognition of this problem, Claimant contends that Dr.
24 Matsumura's finding is buttressed by the findings of the
25 consultative psychologist. See Mot. at 13.

26 **D. Dr. Lewis-Wintrode's Opinion**

27 Dr. Lewis-Wintrode diagnosed Mr. Maxwell with "physical
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1 problems affecting psychological condition." AR at 459. Dr.
2 Lewis-Wintrode noted that Claimant had a short attention span and
3 limited concentration, but he was able to focus on tasks and
4 complete them. Id. at 456. His verbal, performance and full-
5 scale IQ scores were in the mid-average range. Id. at 457. Mr.
6 Maxwell's auditory memory score was in the mid-borderline range.
7 Id. at 458. His visual and immediate memory was in the mid-
8 average range. Id. His working memory score was in the
9 borderline range. Id. Dr. Wintrode-Lewis offered the following
10 prognostic impressions:

11 The claimant can avoid simple hazards. He is
12 able to interact adequately with others as
13 evidenced by his interaction with the examiner
14 and clinical personnel. Psychologically, the
15 claimant would have mild difficulties
16 persisting independently at work-related
17 activities due to some decreases in
18 motivation, attention, and concentration. The
19 claimant can follow one- and two-part
20 instructions. The claimant can handle simple
21 and complex tasks, but at a slower pace. He
22 may have trouble keeping schedules. The
23 claimant could interact with others on a daily
24 basis.

25 Id. at 459.

26 The ALJ determined that Dr. Lewis-Wintrode's findings did not
27 erode the ALJ's determination that Claimant was able to perform
28 light work. Id. at 22. The ALJ noted that "Dr. Lewis-Wintrode
indicated that some of the limitations were on the basis of the
claimant's lack of motivation and not on the basis of mental or
physical impairment." Id. The ALJ concluded that even if he were
to credit Dr. Lewis-Wintrode's findings, "there is no basis for
finding that the claimant was limited in his capacity to meet the

1 mental demands of work for any continuous period of at least 12
2 months." Id.

3 The diagnosis of "physical problems affecting psychological
4 condition" is somewhat ambiguous, but taken in conjunction with
5 the consultative psychologist's prognostic impressions, the
6 diagnosis indicates that Claimant may suffer from mild
7 difficulties concentrating and paying attention to his work.
8 Based on Dr. Lewis-Wintrode's opinion, the ALJ could legitimately
9 conclude that Mr. Maxwell did not suffer from a severe mental
10 impairment, and was not limited in his capacity to meet the mental
11 demands of work for any continuous period of at least 12 months.
12 Id. at 20, 22.

13 **E. Testimony of Mr. Maxwell and Ms. Holloway**

14 At his hearing, Mr. Maxwell testified that he could not
15 concentrate on his job as an admissions representative at a
16 vocation school due to back pain and foot pain. Id. at 563. He
17 testified that he had similar problems working as a graveyard
18 planning counselor. Id. at 565. Ms. Holloway testified that
19 Claimant was constantly complaining of pain, that he did not sleep
20 because of pain, that his pain interfered with his ability to
21 perform tasks like mowing the lawn and grocery shopping, that
22 Claimant had trouble with time frames and remembering people's
23 names, and that he had difficulty sitting in church and at
24 meetings of the Masons. Id. at 554-58.

25 Once a claimant produces objective medical evidence of an
26 underlying impairment which could reasonably be expected to
27 produce pain or other symptoms, and there is no affirmative
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1 evidence suggesting malingering, an ALJ can reject the claimant's
2 testimony about the severity of his symptoms only by offering
3 specific, clear and convincing reasons for doing so. Lingenfelter
4 v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). The ALJ must
5 also provide reasons germane to each witness for disregarding the
6 witness' testimony. Lewis, 236 F.3d at 511. The ALJ may discount
7 lay testimony that conflicts with medical evidence. Id.

8 Here, the ALJ did not find the statements of Mr. Maxwell and
9 Ms. Holloway convincing or credible to the extent that Claimant
10 sought to establish that he was unable to perform all work for a
11 continuous period of at least twelve months since his January 1,
12 2002 onset date. AR at 22. The ALJ provided three reasons for
13 rejecting the testimony of Mr. Maxwell and Ms. Holloway. First,
14 both Claimant and Ms. Holloway had reported elsewhere that
15 Claimant could perform a variety of household chores. Id.
16 Second, Claimant told a physician at Alta Bates Medical Center in
17 May 2003 that he was riding a bicycle at the time he began
18 experiencing abdominal pain. Id. Third, the treatment records do
19 not describe a history of significant treatment for disabling back
20 pain, and there is no evidence that Mr. Maxwell was prescribed
21 strong pain medication. Id.

22 The ALJ rejected Ms. Holloway's testimony about the severity
23 of Mr. Maxwell's psychological limitations based on a Function
24 Report completed by Ms. Holloway on October 7, 2003. See id. at
25 369-77. Ms. Holloway stated that Mr. Maxwell prepares food twice
26 weekly, can sometimes iron a shirt when not in pain, can sometimes
27 wash dishes and do laundry, goes outside three or four times a

1 week, goes shopping twice a week, and goes to church twice a
2 month. Id. She also noted that Mr. Maxwell is depressed due to
3 his back pain, but overall, the impression created by this report
4 conflicts with Ms. Holloway's testimony that Claimant is in
5 constant pain.

6 The ALJ's reliance on Dr. Pon's report provides clear and
7 convincing reasons for rejecting Mr. Maxwell's claims about the
8 severity of his limitations due to pain. Dr. Pon's report does
9 not paint a picture of a claimant in too much pain to concentrate
10 on the job requirements of an admissions representative or a
11 graveyard planning counselor. Dr. Pon noted in December 2003 that
12 Claimant "was sitting in the waiting room comfortably. He was
13 able to get off the chair and walk into the exam room." Id. at
14 425. Dr. Pon notes that "Claimant ambulates with no ambulatory
15 aid . . . He was sitting comfortably during the history taking.
16 He was able to undress, bend over, take off his shoes normally and
17 without discomfort." Id.

18 The ALJ also relied on Mr. Maxwell's statement to a physician
19 in May 2003 that he was riding a bicycle at the time that he began
20 experiencing abdominal pain. See id. at 413. This behavior is
21 not consistent with Claimant's testimony that he cannot
22 concentrate or pay attention due to pain. The ALJ's reliance on
23 the lack of evidence in the record that Mr. Maxwell had been
24 prescribed strong pain medications is less convincing due to Mr.
25 Maxwell's stomach and colon problems. See id. at 561.
26 Nonetheless, the ALJ provided specific, clear and convincing
27 reasons for rejecting any suggestion in Mr. Maxwell's testimony
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1 that his concentration or attention were so impaired due to back
2 pain that he would be unable to return to work as a graveyard
3 planning counselor or an admissions representative for a school.

4 **F. Vocational Expert Testimony**

5 Claimant also disputes the testimony provided by the
6 vocational expert at his hearing. Mot. at 19-21. Claimant
7 contends the vocational expert's testimony is without evidentiary
8 value because the hypothetical propounded to the vocational expert
9 did not fully describe Mr. Maxwell's limitations. Id.

10 The vocational expert testified that Mr. Maxwell's past work
11 as a graveyard planning counselor and admissions representative
12 are performed at the sedentary to light exertional levels. AR at
13 570-71. The vocational expert testified that someone of the
14 claimant's age, education and work experience, who has the
15 capacity for light work with a sit/stand option at will, rare
16 crouching, crawling or stooping, no work at heights and limited
17 use of stairs could work as a graveyard planning counselor or an
18 admissions representative. Id. at 571-72.

19 Claimant contends this testimony is of no value because it
20 did not also include the limitation on concentration due to pain
21 reported by Dr. Matsumura and Dr. Lewis-Wintrode. Mot. at 20.
22 However, the ALJ did take note of the fact that Dr. Matsumura
23 himself did not recommend any limitation due to abdominal pain.
24 See AR at 22, 505. And Dr. Lewis-Wintrode's opinion can be
25 plausibly read as suggesting that Claimant would suffer merely
26 mild difficulties concentrating or paying attention to work-
27 related duties. See AR at 459. Therefore, there was no basis for
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1 the ALJ to add a psychological limitation to the hypothetical, and
2 the vocational expert's testimony is not less valuable for
3 omitting it.

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5 **V. CONCLUSION**

6 For the foregoing reasons, the Court DENIES Claimant's Motion
7 for Summary Judgment and GRANTS Defendant's Motion for Summary
8 Judgment.

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10 IT IS SO ORDERED.

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12 Dated: March 9, 2009

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UNITED STATES DISTRICT JUDGE